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Legal & Regulatory Group

April 30, 2004

Via ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 205554

Re: CG Docket No. 04-53

Dear Secretary Dortch:

The National Automobile Dealers Association ("NADA") submits the following brief comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPR") requesting comment on the regulations it should implement under section 14 of the CAN-SPAM Act of 2003 to protect consumers from unwanted mobile service commercial messages (MSCMs). These comments follow NADA's comments to the Commission dated April 14, 2004 under CG Docket Number 02-278.

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.1 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that may increase the regulatory burden that exists for small businesses.

Our members increasingly rely on e-mail messages to communicate product and service information to their customers, although they typically do not seek to deliver text messages to mobile service or wireless devices. Their e-mail communications may be either "commercial" messages or "transactional or relationship" messages as defined in the CAN-SPAM Act. As discussed in greater detail in our recent comments to the Federal Trade Commission ("FTC")(Project Numbers R411001 and R411008), the statute imposes several new burdens on our members at a time when automobile dealers and other small and mid-size businesses are attempting to comply with a series of new federal regulatory requirements. We therefore urge the Commission to avoid duplicating or adding to the requirements contained in other sections of the CAN-SPAM Act unless absolutely necessary to protect consumers from unwanted MSCMs.

Our primary concern with section 14 of the statute is how it may be applied to the transmission of standard e-mail messages through the Internet that unknowingly reach mobile service devices.

Section 14(d) of the statute defines a "mobile service commercial message" as "a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service…." We agree with the Commission that this definition is not intended to apply to messages that senders transmit to an e-mail account normally accessed by a personal computer which the subscriber has arranged to forward to a wireless device. 69 Fed. Reg. 16,876 (Mar. 31, 2004). As noted by Congressman Markey, these messages are covered by the other sections of the statute and should be excluded from the FCC's section 14 rulemaking. Id. To avoid any ambiguity about the scope of section 14, we urge the Commission to explicitly state that section 14 does not apply to messages that are sent to a non-wireless e-mail address and forwarded to a wireless device by someone other than the original sender.

Regarding commercial e-mail messages that are sent directly to a wireless device, the Commission should carefully consider the means it will provide consumers to avoid receiving such messages. The Commission states in the NPR:

> … we believe that section 14(b)(1) is intended to provide consumers the opportunity to generally bar receipt of all MSCMs (except those from senders who have obtained the consumer's prior express consent). However, we believe that in order to do so, the consumer must take affirmative action to bar the MSCMs in the first instance.

69 Fed. Reg. 16,876 – 16,877.

We agree with the Commission and believe this interpretation may present the least burdensome means for senders of MSCMs to comply with section 14(b). This particularly applies if the consumer expresses a preference to his or her mobile service provider not to receive MSCMs. See 69 Fed. Reg. 16,877 ("… the customer might, at the time he or she subscribes to the mobile service, affirmatively decline to receive MSCMs. The subscriber would still have the option to agree to accept MSCMs from particular senders"). By providing consumers an opt-out opportunity at the provider level, the Commission can avoid imposing the burden of determining who does not wish to receive MSCMs on the multitude of businesses that presently (or in the future may) send MSCMs to consumers. If it is technologically feasible for providers to block unwanted MSCMs to consumers who have expressed a preference not to receive them, this should accommodate consumer preferences while affording small businesses a realistic means of honoring those preferences.

Pursuant to section 14(c) of the statute, the Commission seeks comment on "whether senders at this time have the practical ability to 'reasonably determine' whether an electronic mail message is sent directly to a wireless device or elsewhere." 69 Fed. Reg. 16,877. The Commission identifies several alternatives it may adopt to facilitate this determination. To the extent senders must make this determination to comply with the statute, we believe it may be most easily accomplished by placing a clearly recognizable feature in the e-mail address of MSM subscribers that identifies them as MSM subscribers.

We do not believe this determination would be facilitated by establishing a limited National Do-Not-E-Mail Registry "just for MSM addresses" that would be similar to the National Do-Not-Call Registry. 69 Fed. Reg. 16,878. Based on our members' experience with the National Do-

Not-Call Registry, we believe this alternative would present a significant and unnecessary compliance challenge. The burden associated with having to download, update, scrub and train employees on the use of individual subscriber addresses listed on a registry would disproportionately impact businesses that send only a limited portion of their commercial e-mail messages to consumers with wireless devices.

We similarly disfavor any requirement that businesses, particularly small businesses, develop a website for collecting addresses of subscribers that want to reject future messages. For the reasons identified by the Commission, see 69 Fed. Reg. 16,886, we believe this would present an enormous burden on our members.

The Commission also seeks comment on what should constitute "prior express authorization" to the sender as set forth in section 14(b)(1). We believe senders would benefit from a definition of "prior express authorization" that has the same elements as the FTC's definition of "affirmative consent." However, it is essential that the Commission provide non-exclusive examples of how prior express authorization may be secured. This will provide small businesses with a reference point when they individually attempt to develop the necessary form or electronic application for obtaining prior express authorization from their MSM customers.

Thank you for the opportunity to comment on this matter.

Sincerely,

Paul D. Metrey
Director, Regulatory Affairs